

This Opinion is not a
Precedent of the TTAB

Mailed: September 11, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Apperley Holdings Pty. Ltd.
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Serial No. 79277754
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Terence J. Linn of Gardner, Linn, Burkhardt & Ondersma LLP,
for Apperley Holdings Pty. Ltd.

Jared M. Mason, Trademark Examining Attorney, Law Office 119,
Brett Golden, Managing Attorney.
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Before Shaw, Lynch and Casagrande,
Administrative Trademark Judges.

Opinion by Shaw, Administrative Trademark Judge:

Apperley Holdings Pty. Ltd. (“Applicant”) seeks registration on the Principal



AUSTRALIAN
Botanical
Soap

Register of the mark

for “Bleaching preparations

and laundry detergent for laundry use; cleaning, polishing, scouring and abrasive
preparations; Body soaps; perfumery; essential oils; cosmetics; hair lotions; [and]

dentifrices,” in International Class 3.¹ Applicant has disclaimed the term SOAP apart from the mark as shown. The description of the mark states: “The mark consists of the stylized wording ‘AUSTRALIAN’ in smaller font, below which is the stylized wording ‘Botanical’ in larger font, and below the ‘cal’ is the stylized wording for ‘Soap’ in smaller font.”

The Trademark Examining Attorney refused registration of Applicant’s mark under Trademark Act Section 2(e)(2), 15 U.S.C. § 1052(e)(2), on the ground that the mark is primarily geographically descriptive of Applicant’s goods.

When the refusal was made final, Applicant appealed and requested reconsideration, including, for the first time, a claim of acquired distinctiveness. The appeal was suspended, and the Examining Attorney rejected the claim as insufficient.² After issuance of another final refusal, on the grounds both that the mark is primarily geographically descriptive and that Applicant’s claim of acquired

¹ Application Serial No. 79277754 was filed on December 10, 2019 under Section 66(a) of the Trademark Act, 15 U.S.C. § 1141f(a), based on a request for extension of protection of International Registration No. 1512134, registered on December 10, 2019.

Citations to the prosecution file refer to the .pdf version of the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system and identify documents by title and date. References to the briefs and other materials in the appeal record refer to the Board’s TTABVUE online docketing system.

² We note that in responding to the Examining Attorney’s refusal at this stage, Applicant also stated that it “would provisionally agree to entry of a disclaimer” of all the wording in its proposed mark, if that would place the application in condition for allowance. January 24, 2022 Response to Office Action, TSDR 3. The Examining Attorney maintained the refusal of registration, and in its Appeal Brief, Applicant states that “[i]n the present application the words ‘Australian’ and ‘botanical’ are not disclaimed,” and does not pursue the issue further. 6 TTABVUE 8.

distinctiveness under Trademark Act Section 2(f), 15 U.S.C. § 1052(f), is insufficient, the appeal resumed.

Both Applicant and the Examining Attorney filed briefs. We affirm the refusal to register the mark.

I. Primarily geographically descriptive refusal

The test for determining whether a term is primarily geographically descriptive is whether (1) the primary significance of the term in the mark sought to be registered is the name of a place generally known to the public; (2) the source of the goods or services is the geographic region named in the mark; and (3) the public would make an association between the goods or services and the place named in the mark, that is, believe that the goods or services for which the mark is sought to be registered originate in that place. *In re Newbridge Cutlery Co.*, 776 F.3d 854, 113 USPQ2d 1445, 1448-49 (Fed. Cir. 2015) (citations omitted).

The record must demonstrate that the mark identifies “a place generally known to the public.” *Id.* at 1450. To establish a goods/place association required by the second element of the test, the Office must show “a reasonable predicate for its conclusion that the public would be likely to make the particular goods/place association on which it relies.” *Id.* at 1449 (citing *In re Miracle Tuesday*, 695 F.3d 1339, 104 USPQ2d 1330, 1334 (Fed. Cir. 2012) (internal citations omitted)). “The PTO has long held that where: (1) a location is generally known; (2) the term’s geographic significance is its primary significance; and (3) the goods do, in fact, originate from

the named location, a goods/place association can be presumed.” *Newbridge Cutlery*, 113 USPQ2d at 1449 (citations omitted).

We must determine the primary significance of the mark as a whole, but typically, “the presence of generic or highly descriptive terms in a mark which also contains a primarily geographically descriptive term does not serve to detract from the primary geographical significance of the mark as a whole.” *In re Hollywood Lawyers Online*, 110 USPQ2d 1852, 1853-54 (TTAB 2014). Trademark Act Section 2(e)(2) still applies if merely descriptive matter is included and the mark as a whole retains its primarily geographic significance. *See, e.g., In re Cambridge Digital Sys.*, 1 USPQ2d 1659, 1662 (TTAB 1986) (affirming Section 2(e)(2) refusal of CAMBRIDGE DIGITAL, noting, “we do not believe that the addition of the highly descriptive word DIGITAL and the design detract from the primary geographic significance of the mark”); *see also In re Wada*, 194 F.3d 1297, 52 USPQ2d 1539, 1540-41 (Fed. Cir. 1999) (affirming Board’s finding that “primary geographic significance [of NEW YORK WAYS GALLERY] is not lost by the addition of WAYS GALLERY to NEW YORK”); *In re South Park Cigar Inc.*, 82 USPQ2d 1507, 1514 (TTAB 2007) (holding that “GOLD [in YBOR GOLD] is highly suggestive and laudatory, simply connoting the high quality of the goods, and that it thus does not detract from the geographic significance of YBOR or negate the primarily geographic significance of the mark as a whole”).

Thus, while we consider Applicant’s mark as a whole, it is nonetheless appropriate “to consider the significance of each element within the composite mark in the course

of evaluating the mark as a whole.” *In re Save Venice New York, Inc.*, 259 F.3d 1346, 59 USPQ2d 1778, 1782 (Fed. Cir. 2001).

A. The primary significance of “Australian” refers to a place known generally to the public

The Examining Attorney made of record excerpts from the website www.australia.com, a tourism marketing organization.³ The website excerpt provides information about Australia, events in Australia, and facts about Australian lifestyle. Applicant concedes that “Australia is in fact a geographic place.”⁴ We find that the primary significance of AUSTRALIAN is geographic, i.e., the adjective form of AUSTRALIA, a place generally known to the American public.

Regarding the significance of the wording BOTANICAL SOAP, we note that Applicant has disclaimed the word SOAP which is the generic name of the goods, and the word BOTANICAL at least is descriptive of goods made from plant-based ingredients.⁵ Indeed, Applicant’s webpage indicates that its goods are “natural pure plant oil soap bars . . . made in Australia using the finest quality ingredients.”⁶ Thus, the wording BOTANICAL SOAP does not serve to detract from the primary geographical significance of the mark as a whole. *Hollywood Lawyers Online*, 110

³ March 12, 2020 Office Action, TSDR 2-7.

⁴ Applicant’s Br., p. 4, 6 TTABVUE 5.

⁵ American Heritage Online Dictionary, ahdictionary.com, 8 TTABVUE 11. The Board may take judicial notice of dictionary definitions that (1) are available in a printed format, (2) are the electronic equivalent of a print reference work, or (3) have regular fixed editions. *See In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1747 n.15 (TTAB 2018) (taking judicial notice of definition from Dictionary.com because it was from *The Random House Unabridged Dictionary*), *aff’d mem.*, 777 F. App’x 516, 2019 BL 343921 (Fed. Cir. 2019).

⁶ australianbotanicalsoap.com.au, March 12, 2020 Office Action, TSDR 13.

USPQ2d at 1853-54 (“[T]he presence of generic or highly descriptive terms in a mark which also contains a primarily geographically descriptive term does not serve to detract from the primary geographical significance of the mark as a whole.”). Accordingly, we find the primary significance of the wording AUSTRALIAN BOTANICAL SOAP, as a whole, to be geographic.

B. Whether the goods originate in Australia

We next consider whether the goods originate in Australia. As noted above, the evidence of record establishes that Applicant’s soap is “made in Australia.”⁷ Applicant does not deny that its goods are made there, and it admits that it is “headquartered” in Australia.⁸ We therefore find that Applicant’s goods originate in Australia.

C. Purchasers are likely to make a goods/place association

When there is no question that the geographical significance of a term is its primary significance, and the geographical place is neither obscure nor remote, a public association of the goods with the place is presumed if an applicant’s goods originate in the place named in the mark. *See* TMEP §1210.04; *In re Spirits of New Merced, LLC*, 85 USPQ2d 1614, 1621 (TTAB 2007) (YOSEMITE BEER held geographically descriptive of beer produced and sold in a brewpub in Merced, California, the Board stating that “[s]ince the goods originate at or near [Yosemite National Park], we can presume an association of applicant’s beer with the park.”);

⁷ *Id.* *See also, In re Stereotaxis, Inc.*, 429 F.3d 1039, 1041, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005) (“[R]egistration should be refused if the mark is descriptive of any of the goods for which registration is sought”) (citation omitted).

⁸ Applicant’s Br., p. 4, 6 TTABVUE 5.

In re Joint-Stock Co. "Baik", 80 USPQ2d 1305 (TTAB 2006) (BAIKALSKAYA—the Russian equivalent of from “Baikal” or “Baikal’s”—held primarily geographically descriptive of vodka made from water piped from Lake Baikal, the Board presuming a goods/place association “because applicant is located near Lake Baikal, in the city of Irkutsk.”) As discussed, there is no question that Applicant’s goods originate in Australia and, because Australia is neither obscure nor remote, we presume a public goods/place association.

Applicant nevertheless argues that

[T]he consuming public would not necessarily be likely to make a goods-place association between Applicant’s various cleaning products and either the parsed term

“Australia” or Applicant’s mark



“Australia” is not particularly known for cleaning products, nor is it shown that purchasers particularly care if cleaning products come from a country or continent[.]⁹

Further, according to Applicant, the term Australian in Applicant’s mark, is not primarily geographically descriptive because it could have a number of meanings to the consuming public:

For example, whether the product may be made in a fashion or manner first developed or used in Australia, the product includes ingredients that are “Australian Botanical” products, the product uses ingredients favored by Australian wildlife such as the koala or kangaroo, or, as argued by the Examining Attorney, the product is made in Australia.

⁹ *Id.* at 4-5, 6 TTABVUE 5-6.

These arguments are misplaced as a matter of law. Australia need not be known for Applicant's goods if they are, as here, made there. *See, e.g., In re Cal. Pizza Kitchen Inc.*, 10 USPQ2d 1704, 1707 (TTAB 1988); *In re Carolina Apparel*, 48 USPQ2d 1542, 1542-43 (TTAB 1998). The Australian origin of Applicant's goods obviously demonstrates that goods such as those identified come from Australia. *See Miracle Tuesday*, 104 USPQ2d at 1333 ("Where, as here, a case involves goods rather than services, we have held that 'the goods-place association often requires little more than a showing that the consumer identifies the place as a known source of the product.'") (quoting *In re Les Halles de Paris J.V.*, 334 F.3d 1371, 1374 (Fed. Cir. 2003)).

Further, Applicant's mark need not specify exactly which meaning of "Australian" is intended for its goods because all of the suggested meanings have geographic significance. *See In re Wada*, 52 USPQ2d at 1541 (affirming refusal to register NEW YORK WAYS GALLERY and rejecting mere argument, unsupported by any evidence, that there is a "New York style" of the goods at issue, or that NEW YORK evokes "an aura of status or prestige"); *In re Am. Furniture Warehouse Co.*, 126 USPQ2d 1400, 1404 (TTAB 2018) ("[W]e find that the primary significance of AMERICAN is geographic, the adjective form of AMERICA, a place generally known to the American public"); *In re Premiere Distillery, LLC*, 103 USPQ2d 1483, 1484 (TTAB 2012) (finding that the primary significance of REAL RUSSIAN for vodka is geographic, stating "[i]t is well-established that adjectival forms of geographic terms are also considered primarily geographically descriptive"). We also note that Applicant's website repeatedly touts the Australian geographic origin of its goods, with its CEO and co-

founder stating, “We would like everyone to bring the beauty of Australia’s natural environment into their home,” and prominent text promoting the goods such as “MADE IN AUSTRALIA,” “100% AUSTRALIAN MADE” AND “AUSTRALIAN MADE AND OWNED.”¹⁰

Here, we have no evidence that AUSTRALIAN refers to a non-geographic characteristic of the goods, i.e., that consumers would view the term AUSTRALIAN as anything but a geographic place. *See, e.g., Institut Nat’l des Appellations D’Origine v. Vintners Int’l Co.*, 958 F.2d 1574, 22 USPQ2d 1190, 1195 (Fed. Cir. 1992) (finding evidence showing that Chablis is the name of a region in France insufficient to establish that CHABLIS WITH A TWIST is geographically deceptive of wine under Section 2(a), where evidence showed that the term “Chablis” would be perceived by consumers in the United States as the generic name for a type of wine with the general characteristics of French Chablis).

In any event, even if Applicant had established that AUSTRALIAN may have other meanings in different contexts, which it did not, that would not alter its primarily geographic meaning when used in Applicant’s proposed mark for Applicant’s identified goods. *See Hollywood Lawyers Online*, 110 USPQ2d at 1858 (“[W]ithout additional elements in the mark to detract from the geographic significance [of HOLLYWOOD], there is no allusion to the alternative meaning referencing the ‘glamour’ of the film industry”).

¹⁰ January 8, 2021 Office Action, TSDR 7, 3.

Applicant also argues that its mark is registrable because “[t]he stylized or design presentation of Applicant’s Mark creates a distinctive visual impression beyond the underlying words themselves. This distinctive visual commercial impression is separate and apart from the words themselves.”¹¹ This argument is unpersuasive as well. Adding stylization to geographically descriptive or descriptive wording does not render the resulting mark registrable on the Principal Register unless the stylization creates a commercial impression separate and apart from the impression made by the wording itself, or the applicant can otherwise show by evidence that the particular stylized display has acquired distinctiveness. *See In re Cordua Rests., Inc.*, 823 F.3d 594, 118 USPQ2d 1632, 1639-40 (Fed. Cir. 2016) (“[A] display of descriptive or otherwise unregistrable matter is not registrable on the Principal Register unless the design features of the asserted mark create an impression on the purchasers separate and apart from the impression made by the words themselves[.]”). Applicant’s argument merely characterizes the presentation of the mark as “fanciful” and the fonts as “unusual,” but offers no explanation what separate commercial impression is created by the stylization. We disagree that the font is unusual, and instead find the minimal stylization of the wording does not creates a commercial impression separate and apart from the impression made by the wording itself. Thus, we consider this case distinguishable from *In re Jackson Hole Ski Corp.*, 190 USPQ 175, 176 (TTAB 1976), where the Board found that the stylized letters JH [in JACKSON HOLE] were “displayed in a manner sufficiently distinctive to create a commercial impression

¹¹ *Id.* at 6, 6 TTABVUE 7.

separate and apart from the disclaimed words ‘JACKSON HOLE.’” *Id.* As the Board summarized:

[T]he letters “JH” [in Jackson Hole] are twice the size of the other letters; that unlike any of the other letters, they are partly joined together, creating the visual impression of a monogram; and that they are set down from the rest of the letters, which positioning has the effect of highlighting the “JH” couplet.

Id. Here the level of stylization is minimal. Rather, the lesson from *Jackson Hole* is that “each such case must necessarily be determined on its own merits.” *Id.*

Considering all of the arguments and evidence of record, we find that the mark



is primarily geographically descriptive of Applicant’s goods.

II. Acquired Distinctiveness

Applicant argues in the alternative that its mark is entitled to registration under Trademark Act Section 2(f) because the mark “has achieved substantial secondary meaning in the industry as a mark of distinction for Applicant’s goods.”¹² According to Applicant, its sales in the United States represent “an extraordinary amount of product sold bearing the mark and necessarily generates recognition and secondary meaning in the mark.”¹³

Section 2(f) of the Trademark Act provides, in part, that “nothing herein shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant’s goods in commerce.” 15 U.S.C. § 1052(f). “To establish that a term

¹² *Id.* at 7, 6 TTABVUE 8.

¹³ *Id.* at 8, 6 TTABVUE 10.

has acquired distinctiveness, ‘an applicant must show that in the minds of the public, the primary significance of a product feature or term is to identify the source of the product rather than the product itself.’” *In re Guaranteed Rate, Inc.*, 2020 USPQ2d 10869, at *2 (TTAB 2020) (quoting *In re La. Fish Fry Prods., Ltd.*, 797 F.3d 1332, 116 USPQ2d 1262 (Fed. Cir. 2015) (internal quotation omitted)). Applicant bears the burden of establishing that its proposed mark has acquired distinctiveness. *Id.*

The determination of whether a mark has acquired distinctiveness is based on all of the evidence, considered as a whole, including evidence of: (1) association of the trade[mark] with a particular source by actual purchasers (typically measured by customer surveys); (2) length, degree, and exclusivity of use; (3) amount and manner of advertising; (4) amount of sales and number of customers; (5) intentional copying; and (6) unsolicited media coverage of the product embodying the mark. *Converse, Inc. v. Int’l Trade Comm’n*, 909 F.3d 1110, 128 USPQ2d 1538, 1546 (Fed. Cir. 2018). “The issue of acquired distinctiveness is a question of fact.” *Yamaha Int’l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001, 1008 (Fed. Cir. 1988).

“[T]he greater the degree of descriptiveness the term has, the heavier the burden to prove it has attained secondary meaning.” *In re Boston Beer Co.*, 198 F.3d 1370, 53 USPQ2d 1056, 1058 (Fed. Cir. 1999) (quoting *In re Bongrain Int’l (Am.) Corp.*, 894 F.2d 1316, 13 USPQ2d 1727, 1727 n.4 (Fed. Cir. 1990)); *Roux Labs., Inc. v. Clairol Inc.*, 427 F.2d 823, 166 USPQ 34, 39 (CCPA 1970) (“The amount and character of the evidence, if any, required to establish that a given word or phrase is a trademark or ‘has become distinctive’ of the goods necessarily depends on the facts of each case and

particularly on the nature of the alleged mark.”); *see also In re Spiritline Cruises LLC v. Tour Mgmt. Servs.*, 2020 USPQ2d 48324, *16 (TTAB 2020) (“But we do not forgo discussion on the degree of geographic descriptiveness”).

The degree of geographic descriptiveness in this case is not a close call. The place name obviously is quite well-known, and Applicant’s own promotion of its goods heavily emphasizes their geographic origin. *See id.* at *17 (in finding a high degree of geographic descriptiveness, Board relied in part on the applicant’s own specimen repeatedly using the geographic place name in connection with its services). We conclude that AUSTRALIAN BOTANICAL SOAP is highly geographically descriptive, and that Applicant bears a commensurately high burden to prove that it has acquired distinctiveness.

To support its claim of acquired distinctiveness, Applicant has submitted only the declaration of Travis Hampton, President of Value Max Products, LLC, the exclusive United States distributor for Applicant’s AUSTRALIAN BOTANICAL SOAP. According to relevant portions of the Hampton declaration:¹⁴

- Soap products bearing the AUSTRALIAN BOTANICAL SOAP mark have been sold in the United States since at least December 31, 2018.
- AUSTRALIAN BOTANICAL SOAP has been sold in the United States in Costco stores. Below is a picture showing goods bearing the mark on sale at a Costco store:

¹⁴ July 6, 2021 Request for Reconsideration, TSDR 8-11.



- Since 2019, Applicant, through its United States distributor, has sold approximately 17 million bars of its AUSTRALIAN BOTANICAL SOAP, worth 20 million dollars (although the declaration states that some 7 million dollars of these sales were “subject to recall” and “will be re-shipped to the United States.”).
- Mr. Hampton concludes that:

[D]ue to the extensive sales by and popularity of AUSTRALIAN BOTANICAL SOAP & Design goods, the

mark  has achieved recognition by the purchasing public in the United States and elsewhere that is beyond that of being a geographically descriptive designation. . . . [T]he purchasing public has come to

recognize the mark  as a trademark for the goods[.]

Applicant's single submission on the issue of acquired distinctiveness thus relies solely on several years use in the United States and sales representing some 17 million bars of soap sold.

We find that the Hampton declaration is insufficient to establish that the mark has acquired distinctiveness, particularly in light of the highly geographically descriptive nature of the mark. Applicant's use of the mark for only a few years—since 2019—suggests that the mark is unlikely to have acquired distinctiveness in the minds of consumers. *See In re Ic! Berlin Brillen GmbH*, 85 USPQ2d 2021, 2024 (TTAB 2008) (Length of use may be considered as evidence of acquired distinctiveness under Section 2(f), but “the language of the statute is permissive and the weight to be accorded this kind of evidence depends on the facts and circumstances of the particular case.”); *see also Alcatraz Media, Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1766 (TTAB 2013) (“Given the highly descriptive nature of registrant's mark [ANNAPOLIS TOURS], continuous use alone since 1992 would not be sufficient to establish acquired distinctiveness.”), *aff'd mem.*, 565 F. App'x 900 (Fed. Cir. 2014).

Regarding Applicant's sales figures, although the volume of product sold is not insignificant, the numbers lack any context comparing them to soap sales generally (or even soap sales within a subcategory such as “botanical” soaps), which would be required to show that the mark has acquired distinctiveness. *See, e.g., Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1480 (TTAB 2016) (probative value of sales revenue figures diminished by the amount being just a raw number without context as to the applicant's market share or whether this amount is significant in

the industry); *AS Holdings, Inc. v. H & C Milcor, Inc.*, 107 USPQ2d 1829, 1838 (TTAB 2013) (sales numbers devoid of context such as market share insufficient); *Target Brands Inc. v. Hughes*, 85 USPQ2d 1676, 1681 (TTAB 2007) (same).

In sum, we find Applicant's evidence is insufficient to meet its burden to

demonstrate that  has acquired distinctiveness as a trademark for the identified goods.

III. Conclusion

We have carefully considered all arguments and evidence of record, including any not specifically discussed. We find that Applicant's mark, , in its entirety, is primarily geographically descriptive of Applicant's identified goods under Trademark Act Section 2(e)(2). Additionally, the record does not support a finding that the mark has acquired distinctiveness.

Decision: The refusal to registration the mark  is affirmed on the ground that the applied-for mark is primarily geographically descriptive pursuant to Trademark Act Section 2(e)(2), and has not acquired distinctiveness. Registration to Applicant is refused.